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Lex Loci Delicti or Significant Contacts--That is Not the Question

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Notes

LEX LOCI DELICTI OR SIGNIFICANT CONTACTS—THAT IS NOT THE QUESTION

Introduction

Rules of law are the language of the law. They are indispensable only insofar as they provide a vehicle for expressing thought. Consequently, when legal principles frustrate rational solutions to problems arising out of human activities, they should be abandoned. This sociological jurisprudential reasoning, boldly affronting the historic notion of stare decisis, appears today to have won more friends than its time-worn rival. A quick glance at the field of conflicts of law provides ample support for this conclusion. With unprecedented unanimity, conflicts scholars are clamoring for sweeping revisions of the choice of law rules; but with unparalleled discord, none can agree as to the form these revisions should take.[1]

Nevertheless, it is the purpose of this writing not to swim in this current of diversity, but to postulate still another reform. At the outset, however, it must be noted that the scope of this note has been purposefully restricted to injuries to tangible things. This is done in an effort to abstain from generalities and to accommodate the writer's conviction that social policies underlying various kinds of torts differ, which, translated, means desirable results may not always obtain by applying the same choice of law rule to every kind of tort.[2] Yet, it must be observed that this narrow treatment is not meant to encase the following hypothesis within iron-clad boundaries. Contrarily, it is hoped the following proposal can find uniform application in every multi-state tort situation, if it is the consensus that such can be done without perverting common sense.

Lex Loci Delicti

The principle generally recognized today as the traditional tort choice of law rule had its decisional origin in 1880. The United

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[1] See, *e.g.*, Cavers, *The Two Local Law Theories*, 63 Harv. L. Rev. 881 (1951); Currie, *Notes, Methods and Objectives in the Conflicts of Laws*, 1959 Duke L.J. 171; Ehrenzweig, Conflicts of Laws 309 (1962); *New Trends in the Conflict of Laws*, 28 Law & Contemp. Prob. 673-869 (1963).

[2] *E.g.*, interference with the marriage relationship, alienation of parent's affections, and interference with contractual relationship possibly may better be

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States Supreme Court, in *Dennick v. Railroad Co.*,[3] held to be applicable the wrongful death statute of the state in which a right of action has become fixed and a legal liability incurred. This concept came to be known as the "vested rights doctrine." Beale, using vested rights as his base, developed a formula whereby torts were governed by the law of the "place of the wrong."[4] It was early demonstrated that the "place of the wrong" theory needed refinement in order to sufficiently contend with those instances in which the place of the conduct and the place of the injury were not coincident. In those situations the question left unresolved by Beale's formula was—where was the place of the wrong? Some courts and noted authorities expressed the place of the wrong in terms of conduct.[5] Beale did not share this view, for he considered the place of the wrong to be "the place where the person or thing harmed is situated at the time of the wrong."[6] In short, he theorized that the law of the place of the injury was determinative. His thinking was adopted by the first *Restatement*[7]—not at all peculiar considering he was the reporter—as evidenced by section 377 which provided, "the place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."[8]

The *Restatement's* posture for nearly two decades received almost uncritical judicial acceptance.[9] It was not until 1963, that the New York court in *Babcock v. Jackson*[10] unequivocally disavowed[11] the place of injury concept. Shortly thereafter, Pennsylvania followed the lead in *Griffith v. United Air Line, Inc.*[12] Other courts disingenuously, by one artifice or another, have also sought relief from the mechanical rigors of *lex loci.* Nonetheless, the place of the injury rule can still be said to reflect present law, at least in the area of negligent torts.[13]

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dealt with by a choice of law rule other than the one about to be prosposed.

[3] 103 U.S. 11 (1880).

[4] Beale, A Treatise on the Conflicts of Laws or Private International Law (1916).

[5] Connecticut Valley Lumber Co. v. Maine Cent. R.R., 78 N.H. 553, 103 Atl. 263 (1918); Ehrenzweig, *supra* note 1 at 546.

[6] 2 Beale, Conflict of Laws § 377.2 (1935).

[7] Restatement, Conflict of Laws § 377 (1934).

[8] *Ibid.*

[9] Ehrenzweig, *supra* note 1, at 545.

[10] 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

[11] *But c.f.*, Murphy v. Barron, 23 App. Div. 2d 732, 258 N.Y.S.2d 139 (1965); Long v. Pan American World Airlines, Inc., 23 App. Div. 2d 386, 260 N.Y.S.2d 750 (1965).

[12] 416 Pa. 1, 203 A.2d 796 (1964).

[13] It appears that some courts prefer to apply the law of the place of con-

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SIGNIFICANT CONTACTS

As early as 1924, the vested rights concept became the target of Lorenzen's well-aimed darts.[14] He provided the catalyst from which criticism has flowed ever since.[15] The doctrine's mechanistic approach in an area of sociological jurisprudence accounts for much of this. However, philosophic notions aside, it is also true that *lex loci* has occasioned at times harsh and irrational results,[16] which are primarily attributable to the rapid technological advances society has experienced in the air and motor transportation industries. Widespread utilization of these high-speed modes of travel unquestionably has created a more fluid society. This mobility has increased the number of multi-state torts while at once enlarging the possibility of the place of injury being totally fortuitous—fortuitious in the sense that the state where the injury occurred has no significant relationship whatsoever with the parties or the occurrence. Sometimes, the only nexus the state where the injury occurred has with the parties and occurrence is the purely adventitious circumstance that the injury occurred there.

To remedy the mechanical and periodically irrational results of the place of the injury doctrine, myriad formulas have been contrived, all of which proceed to summarily reject the old doctrine in favor of the suggested proposal. Out of those formulas contending for mastery, but one has received judicial sanction.[17] This is known variously as the "center of gravity" or "grouping of contacts" doctrine. The adoption of this alternative was preluded by a series of cases in which the courts, by one rationale or another, avoided inexorable application of *lex loci*.[18] The courts in each of these cases examined the particular circumstances presented and applied the law of some jurisdiction other than the place of the injury because it had a more compelling interest in the application of its law to the legal issue involved. But it was not until the New York court in

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duct in cases of intentional torts—especially when the forum is the place of the conduct and there exists forum liability as opposed to foreign non-liability. See, Ehrenzweig, *The Place of Acting in Intentional Multi-state Torts: Law and Reason versus the Restatement*, 36 Minn. L. Rev. 5-6 (1951).

[14] Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws*, 33 Yale L.J. 736 (1924).

[15] Cook, Logical and Legal Bases of the Conflict of Laws (1942); see also, *supra* note 1.

[16] Carter v. Tillery, 257 S.W.2d 465 (Civ. App. Tex. 1953).

[17] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

[18] Alaska Packers Association v. Industrial Acc. Comm., 294 U.S. 532 (1935); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Schmidt v. Driscoll Hotel, 249 Minn. 376, 82 N.W.2d 365 (1957).

Babcock, followed a year later by the Pennsylvania court in *Griffith*, that the place of the injury doctrine was candidly repudiated. It could not have been made clearer, than when the *Babcock* court averred:

> The 'center of gravity' or 'grouping of contacts' doctrine adopted by this court in conflicts cases involving contracts impresses us as likewise affording the appropriate approach for accommodating the competing interests in tort cases with multi-state contacts. Justice, fairness and 'the best practical result' [citation omitted] may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation. The merit of such a rule is that 'it gives to the place "having the most interest in the problem" paramount control over the legal issues arising out of a particular factual context' and thereby allows the forum to apply 'the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation.'[19]

With equal clarity, the *Griffith* court declared:

> After careful review and consideration of the leading authorities and cases, we are of the opinion that the strict lex loci delicti rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of policies and interests underlying the particular issue before the court.[20]

To add to the support of the "grouping of contacts" approach, the second *Restatement*[21] has officially adopted it and has eulcidated the doctrine, about as well as it can be, in section 379, which provides:

> 1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.
>
> 2) Important contacts that the forum will consider in determining the state of the most significant relationship include:
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> a) the place where the injury occurred,
> b) the place where the conduct occurred,
> c) the domicile, nationality, place of incorporation and place of business of the parties, and
> d) the place where the relationship, if any, between the parties is centered.
>
> 3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules [involved].

The Reporter's comments on section 379 reveal that the importance to be ascribed to various contacts corresponds with the order in which they have been listed and also that the listed contacts are not

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[19] 191 N.E.2d at 283.
[20] 203 A.2d at 805.
[21] Restatement (Second), Conflict of Laws § 379 (Tent. Draft No. 9, 1964).

exclusive, but rather the courts will consider any contact which can reasonably be said to be of significance in connecting the occurrence and the parties with a given state.

While the *Restatement* readily evinces that the new methodology is gaining momentum, it still must be asserted that the traditional concept represents the overwhelming weight of authority, despite the *Restatement* and the fact that two outstanding courts have aligned themselves in the opposite camp and have been joined by still others who have circuitously done so.[22]

LEX LOCI DELICTI *versus* SIGNIFICANT CONTACTS

As previously remarked, war was declared on the traditional rule in 1924.[23] It has raged with increasing ferocity from that time,[24] with the champions of the significant contacts theory remorselessly clamoring for the demise of *lex loci.* Not undaunted, the die-hard paladins of the traditional method,[25] unwilling to make concessions, have entrenched and seemingly are prepared for a protracted conflict.

Anomalously, both sides claim rationality to be their devastating weapon. Before any attempt can be made to restore peace to the strife-torn conflict of laws territory, it appears necessary to subject both factions to a scrutinous review. The traditionalists' site will be examined first.

The North Carolina court in *Shaw v. Lee* refractorily rejected any rule other than the traditional one, refusing "to voyage into such an uncharted sea, leaving behind well established conflict of law rules."[26]

Sparks, a Missouri practitioner, addressing himself to the *Babcock* decision, dogmatically declared it to be "wholly indefensible," further adding,

> [T]hat the *Babcock* opinion will throw the law governing torts into a state of utter confusion, will bring forth a hodge podge of decisions based neither on rhyme nor reason, will breed uncertainty, will encourage forum shopping by the parties, will increase provincialism

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[22] Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); see also, *supra* note 18.

[23] Lorenzen *supra* note 14.

[24] Cook *supra* note 15; Cavers, *A Critique of the Choice of Law Problem,* 47 Harv. L. Rev. 173 (1933); Morris, *supra* note 1; Cheatham and Reese, *Choice of the Applicable Law,* 52 Colum. L. Rev. 959 (1952); Ehrenzweig, *The Most Significant Relationship in the Conflicts of Law of Torts,* 28 Law & Contemp. Prob. 700 (1963).

[25] Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1018 (1965); Sparks, *Babcock v. Jackson—A Practicing Attorney's Reflections Upon the Opinion and Its Implications,* 31 Ins. Counsel J. 428 (1964).

[26] 129 S.E.2d at 293.

> throughout this federalized country and will allow recovery solely that one might recover.[27]

Basically, Sparks' arrows are shot from the bow of thought that the center of gravity concept is devoid of those virtues generally conceded to inhere in the place of the injury doctrine. Let us examine this position.

In the first place, it is indubitable that the place of injury rule insures a uniform result. Anyone injured in a mishap involving multiple parties can be assured, under the traditional approach that any claim he might asssert will be treated in accordance with the exact same law as other claims asserted by fellow parties. The beauty of this feature is that all parties will be treated similarly. If the parties were subjected to the vagaries of varying statutes some might recover and others might not despite identical grievances. This, it appears, would do violence to the historic notions of fair play and substantial justice. Appropriately, the place of the injury rule precludes such an occurrence. However, the competing doctrine, by its very terms, encourages dissimilar results, in that significant contacts may vary from party to party thus warranting application of different states' laws.[28]

In addition, the place of the injury formula guarantees an objective result. Objectivity, hopefully the hallmark of every judicial tribunal, obtains because the traditional view is not susceptible to intrusions of local influence and/or judicial caprice. Those jurists who harbor the provincial notion that the forum's law represents the only proper solution to controversies, are not afforded the opportunity to judicially sanction such notions under *lex loci,* whereas the malleability of the alternative doctrine invites the ills of subjectivity and provincialism, in that the grouping of the contacts approach empowers the court to group those contacts it deems significant, thus providing a ready vehicle for manipulation and exploitation in favor of the forum law.

Moreover, the place of the injury doctrine, havings its conceptual foundation in the vested rights theory, fixes the rights and liabilities of the parties at the moment the tort occurs. This lends certainty and predictability, while at once deterring forum shopping and unwarranted litigation.

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[27] Sparks, *supra* note 25, at 428.

[28] *Compare,* Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961) *with* Gore v. Northeast Airlines, Inc., 222 F. Supp. 50 (S.D.N.Y. 1963). Admittedly, *Kilberg* turned on the procedure–substance dichotomy, but grouping of contacts rationale was the controlling influence.

Certainty stems from the fact that the applicable law does not depend for its existence upon the "wisdom" of the court in grouping and appraising the contacts, but rather is simply determined by an objective test which the legal practitioner can apply well in advance of litigation. This allows the practitioner to know immediately upon consultation by a client which state's law will govern. Without conjecture, he can accurately evaluate the case and better advise the client. This in turn generates predictability, for an attorney, in knowing which state's law will govern, is positioned to predict the outcome of any future litigation. Of course, if the anticipated outcome is unfavorable to the client or at least questionable, the attorney will caution the client to effect an out-of-court settlement. This provides the gratuitous yet salutary by-product of alleviating the burdensomely over-crowded conditions of the courts. In addition, the immutability of the rights and liabilities under the place of the injury theory establishes a bastion against forum shopping, in that irrespective of which forum is selected the rights and liabilities of the parties remain the same. Consequently, the inducement to shop for a forum is virtually eliminated.

On the other hand, the successor theory spawns uncertainty in that few, if any, are sufficiently Solomon-like to know in a given factual context what a given court will determine to be the applicable state law. As a result, predictability will falter, forum shopping will flourish and litigation will cascade into the courts.

Furthermore, a factor that must not be overlooked is that the historic method provides the courts with a tool that can be easily employed, since the place of the injury almost invariably depends upon factors readily discernible. The alternative device, however, is abstrusely and complexly articulated and as a consequence, is difficult to apply. Its complexity is compounded by the careful refrain of the courts employing it from enunciating a standard by which significant contacts can be determined and by which the relative significance of these contacts can be appraised.[29]

The traditionalists further buttress their position by aptly underscoring that there are times when two or more states will have equal interests in the decision of the case. If so, the policy of significant contacts offers little assistance in the determination of the choice of law issue. It is urged that the designed flexibility of the new concept infects the law with chaos, for almost any result a court might choose to reach can superficially be justified by the grouping of

[29] *But c.f.*, Restatement, *supra* note 21, at comment b and c.

contacts approach. Recovery for the sake of recovery will in essence become the rule, insofar as forums under the new system could handily be solicitous of the welfare of its citizens at the expense of less-needy citizens or insurance companies. In sum, it is insisted that the flexible counterpart to *lex loci delicti* invites anarchy.

On this note, it becomes time to explore the defenses of those in their pitched camps on the other side of the battle zone. Apparently oblivious to the volley of spears hurled by the traditionalists, the progressives assail the opposition as anachronists—the belated products of medieval scholasticism.[30] They scornfully deride the traditionalists as being blind to that widely-accepted philosophic jurisprudential idea that problems of law are problems of social engineering and not of mechanical logic. The progressives mercilessly foray by underlining the fact that social engineering is impossible in an atmosphere of static, inflexible rules which fail to take account of the social, economic and practical considerations of justice, which more or less directly bear upon technical law. What's more, the exponents of the new methodology continue by declaring that uniformity and certainty are not the sole ends to be attained and that ease of application and predictability are insufficient reasons to perpetuate an unsound rule.

"The vice of the vested rights theory is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved."[31] More particularly, it is maintained that the place of the injury theory "ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues."[32]

With force and logic, Chief Justice Desmond of the New York Court of Appeals addressed himself to the shortcomings of the traditional rule:

> Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move. . . . An air traveler from New York may in a flight of a few hours' duration pass [over many commonwealths]. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely *fortuitous*. [Emphasis added.][33]

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[30] Yntema, *The Hornbook Method and the Conflict of Laws*, 37 Yale L.J. 468 (1928).

[31] *Id.* at 482-83.

[32] Babcock v. Jackson, 191 N.E.2d 279, 281 (1963).

[33] Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 39, 172 N.E.2d 526, 527 (1961).

The Pennsylvania court in *Griffith v. United Airlines, Inc.*, artfully rebutted the traditionalists' contention that the center of gravity system foments chaos:

> It must be emphasized that this approach [grouping of contacts] to choice of law will not be chaotic and anti-rational. 'The alternative to a hard and fast system of doctrinal formulae is not anarchy. The difference is not between a system and no system, but between two systems; between a system which purports to have, but lacks, complete logical symmetry and one which affords latitude for the interplay and clash of conflicting policy factors.' [citations omitted.] Moreover, in evaluating qualitatively the policies underlying the significant relationships to the controversy, our standard will be no less clear than the concepts of 'reasonableness' or 'due process' which courts have evolved over many years.[34]

Without further discourse, it becomes manifest that the myriad forays across the battleline have raised from the bowels of the arena a dust-cloud that has obfuscated rather than enlightened. Through the opaque haze billowed up by the plethora of arguments and counter-arguments, there lucidly emerges but these uncontested facts: 1) the place of the injury rule is possessed of certainty, uniformity of result, predictability, ease of application, and other desirable traits; 2) the fluidity of twentieth-century society allows for situations in which the place of injury is entirely fortuitous; 3) the place of the injury rule, blind to the interests of any state other than the place of the injury, leads to harsh and irrational results when the place of the injury is fortuitous; and 4) the flexible significant contacts doctrine, although besest with numerous frailties, is equipped to handle those situations in which the place of injury is fortuitous.

To re-establish harmony to the embattled conflict of laws area, it appears necessary to effectuate a methodology that will sufficiently take cognizance of the foregoing enumerated facts.

MARRIAGE OF THE TWO DOCTRINES

An arbiter attempting to effect a satisfactory compromise between warring factions must approach the task with a view to the best of both sides from which he must borrow in order to forge an acceptable solution. So also must it be done here.

This eclectic process may be properly commenced by distillating that which is desirable from the traditional rule. Since the black-letter traditional rule is incontrovertibly endowed with simplicity, certainty, predictability, and uniformity of result, besides serving as

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[34] 203 A.2d at 806.

a deterrent to forum shopping and unwarranted litigation, it appears that it should be preserved in some form. It is equally true, however, that the wooden application of the doctrine leads to a sacrifice of justice, fairness and the best practical result when the place of injury is fortuitous. Consequently, it is apparent that the rule should not be preserved without modification as the traditionalists would have it.

Unlike the traditional rule, the newly ordained concept, giving effect to that state's law which has the most significant relationship with the parties and the occurrence, can justly and fairly treat those situations in which the place of injury is fortuitous. In this respect, the doctrine is most desirable and should be utilized in some form. Yet the doctrine is handcuffed with numerous shortcomings—complexity, uncertainty, unpredictability, disparity in results, inadequacy in cases where competing governmental interests are equal, besides inducing forum shopping, unwarranted litigation and provincialism. Viewed in this light, surely it should not receive *carte blanche* acceptance as the unqualified successor of the traditional approach, as the progressives would have it.

Observed in its proper perspective, neither method is self-sufficient. But fortunately, the assets of the traditional rule compensate for the liabilities of its competitor and vice versa. The doctrines are complementary, and therefore can peacefully co-exist. They are not mutually exclusive; they are not antitheticals.

It is submitted, that the virtues of *lex loci* command its continuance, but not without exception. The ineptitude of the traditional rule in dealing with those situations in which the place of injury is fortuitous and the facility with which grouping of contacts does resolve these situations clearly evinces that the center of gravity approach should be engrafted upon the traditional doctrine as an exception[35] to be applied when the place of the injury is fortuitous. Surely, justice, fairness and the best practical result should be the product of every adjudication. When these goals can be assured in combination with the desirable traits of *lex loci* and in the absence of the difficulties of the grouping of contacts, with what persuasion can it be maintained that this should not be done? Yet, to summarily discard the place of the injury doctrine, by implication, suggests just that. In the preponderance of the multi-state tort cases, the place of

[35] There are presently two well-settled exceptions to the placé of the injury rule: 1) the forum need not apply the procedural law of the place of the injury, and 2) the forum need not apply the substantive law of the place of the injury when the policy underlying the foreign law is contrary to a deep-rooted public policy of the forum.

the injury and the tortious conduct coincide in a place that cannot be properly considered fortuitous. Consequently, application of the historic rule in those cases would not do violence to justice, fairness and the best practical result. Only when the place of the injury is fortuitous does the traditional rule run afoul the notions of fair play; thus only in those circumstances should it be abandoned in favor of the complementary grouping of contacts doctrine. It is submitted that the old mansion need not be visited by the wrecking crews, but rather it needs only that remodelling that will enable it to accommodate the mobile twentieth-century.

Repeated references have been made to the term "fortuitous" without attempting to affix a legal definition. By "fortuitous" in the legal sense, it is meant that the party involved in the multi-state tort had no intention to come to rest within the state where the injury occurred. When the tortiously aggrieved party is injured while *in transitu* and has not voluntarily undertaken to live and regulate his daily life for a period of time, exceeding at least a twenty-four hour period, within the state in which the injury occurred, then the place of the injury is fortuitous. In such a circumstance, the injured party should neither be entitled to the protections, nor subjected to the disabilities of that state's law. Consequently, the traditional rule should be abandoned in favor of the grouping of contacts exception.

An injured party clearly demonstrates an intention to come to rest within the place of injury if he sustains the injury during the course of a six-week training program,[36] during the course of a one week vacation,[37] or during the course of a weekend fishing or hunting trip. The phrase "during the course of" presupposes that the travelling party has arrived at the state to which he intended to come to rest for his business, vacation or sport purposes. The "intention to come to rest" test provides the courts with a simple tool with which to readily determine whether the traditional rule or the grouping of contacts exception applies. Doubtless, close questions will arise as to whether or not a party intended to come to rest. These questions should be resolved easily and simply by the courts' indulging the presumption that the injured party had intended to come to rest, thus justifying application of the traditional rule. It would then be incumbent upon the party seeking application of the exceptional center of gravity approach to rebut the presumption by clearly demonstrating he was, infact, *in transitu*, with no intention to come to rest within the state of injury. Surely the onus of this require-

[36] Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792 (1965).
[37] Macy v. Rozbicki, 23 App. Div. 2d 532, 256 N.Y.S.2d 202 (1965).

ment is not unduly burdensome, for it should be relatively easy for a Kentucky party or his representative, for example, to establish that he was merely driving through the state of Georgia, where the injury occurred, on the way to a vacation in Florida; or that he was merely spending the day shopping in Cincinnati, Ohio, where the injury occurred, intending to return home that evening to one of the northern Kentucky communities; or that the plane routed to New York for a business trip tragically dropped out of the sky into Pennsylvania. Of course, all of these situations present examples in which the place of injury is fortuitous, in that the injured party was *in transitu,* and all these examples should be susceptible of easy proof.

Further clarification of when an injury is fortuitous can be made by exploring more fully the foregoing hypothetical in which the Kentuckian was traveling by air to New York on business. If the plane's tragic descent occurred in New York, where the party had voluntarily undertaken to go for a period of time exceeding at least a twenty-four hour period, then the place of the injury should not be classified as fortuitous, despite the fact that semantical purists would argue that technically the party had not come to rest within New York. What actually controls is the party's intention, although almost invariably the party's intention can be demonstrated by the act of coming to rest within a state. When a party intends to temporarily quit his domicile and to take up temporary residence elsewhere for whatever reason, he should be subject to that other state's substantive law from the time he enters within the boundary of that state to the time he re-crosses the boundary out of the state. This means that if on the Kentuckian's return trip, after a safe arrival, his plane crashes in New York on its way out of the state the place of the injury is still not fortuitous and the traditional rule applies. Should the plane fall in Ohio on the return trip, the place of the injury would again be fortuitous; thus the exception would apply. In the former example, the injured party had previously intended to come to rest within New York and had done so; consequently he is subject to New York law until he has completely removed himself from within the state's boundaries, and in the latter the injured party had no intention to come to rest within Ohio, so the place of injury was entirely fortuitous.

Although on the surface the proposed marriage of the two doctrines is novel, it is suggested that the New York courts have unwittingly, through confusion and disharmony, maneuvered themselves into a position somewhat akin to the proposal. In *Dym v.*

Gordon, the court, while scrupulously adhering to the *Babcock* rationale, frankly stated: "Of compelling importance in this case is the fact that here the parties had come to rest in the State of Colorado and had thus chosen to live their daily lives under the protective arm of Colorado law."[38] The court distinguished *Babcock*, in that in *Babcock* the New Yorkers at all times were *in transitu*.[39] The *Dym* court, if it had employed the suggested technique of this writing, would have arrived at precisely the same result without squandering precious judicial time and energy by finding it necessary to first:

> [I]solate the issue, next to identify the policies embraced in the laws in conflict, and finally to examine the contacts of the respective jurisdictions to ascertain which has superior connection with the occurrence and thus would have a superior interest in having its policy or law applied.[40]

Curiously, two intermediate New York decisions, in patently restricting *Babcock* to its facts, inadvertently support the foregoing proposal. One court intoned that "*Babcock* did not, except in the limited sense indicated by the case itself, disavow or repudiate the traditional vested rights doctrine,"[41] while the court in *Long v. Pan American World Airlines, Inc.*, sharply averred:

> It is contended by plaintiffs that the so-called 'grouping of contacts' or 'center of gravity rule' entirely supersedes the traditional rule and that the latter is no longer in any respect viable. We believe that this contention represents counsel's hope rather than the law as found and runs counter to what has been specifically decided.[42]

It could be no more graphically demonstrated that even within the supposed citadel of the grouping of contacts doctrine the war between the two doctrines is being hotly waged. But more importantly, it is apparent that while many jurists manning the New York courts are unwilling to accept *Babcock* as a blanket rule supplanting the traditional concept, they are willing to concede that *Babcock* represents an exception to be engrafted upon the traditional view. In this respect, these jurists support the formula proposed in this writing.

In conclusion, it is submitted that the proposed marriage of the two doctrines can best satisfy the needs of the twentieth-century

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[38] 16 N.Y.2d at 125, 209 N.E.2d at 795.
[39] *Ibid.*
[40] 16 N.Y.2d at 124, 209 N.E.2d at 794.
[41] Murphy v. Barron, 23 App. Div. 2d 732, 258 N.Y.S.2d 139, 143 (1965).
[42] 260 N.Y.S.2d 750, 752 (1965).

tort choice of law rule, while at once restoring tranquility to the embattled conflict of laws area. Thus Justice Traynor[43] can finally be answered—this conflict is NOT really necessary for there is no reason why the two doctrines cannot be married and live happily until the advances of society once again command a change.

Laurence W. Grause

[43] Traynor, *Is This Conflict Really Necessary?*, 37 Tex. L. Rev. 657 (1959).